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In The

Supreme Court of The United States

October Term, 1994

JOSEPH PETITO,

Petitioner,

- against -

ALICE-MARY PIFFATH, as Administratrix of the Estate of RALPH PETER PIFFATH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether or not PETITO's Constitutional right to due process of law was abridged when the New York Court of Appeals denied him recovery under the mortgage based on its irrational ruling that PIFFATH's stipulation to pay the full amount due under the mortgage was somehow divorced from the mortgage debt itself and therefore insufficient to comprise an acknowledgment thereof that would renew the statute of limitations?

2. Whether or not the New York Court of Appeals' determination was in error because of its failure to consider the effect of the automatic stay provision in the Bankruptcy Code upon the running of the state statute of limitations?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Parties 2

Opinions Below 2

Jurisdictional Statement 3

Constitutional and Statutory Provisions Involved . 3

Statement of the Case 5

Reasons for Granting the Writ 8

A. THE COURT OF APPEALS' DENIAL OF RECOVERY ON A VALID LIEN CONSTITUTED A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW 8

B. THE COURT OF APPEALS FAILED TO PROPERLY APPLY THE PRINCIPLE THAT BECAUSE OF HYDRODYNE'S BANKRUPTCY FILING THE AUTOMATIC STAY UNDER *11 U.S.C. 362* TOLLED THE RUNNING OF THE STATE STATUTE OF LIMITATIONS 14

CONCLUSION 16

Appendix:

Order of the Court of Appeals on
Reargument dated February 21, 1995 . . . . A-1

Order of the Court of Appeals
dated December 13, 1994 . . . . . A-2

Order of the Appellate Division - Second
Department dated December 6, 1994 . . . A-11

TABLE OF AUTHORITIES

Cases: *Page*

Board of Regents v. Roth, 408 U.S. 564 8

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 9

Corinth Joint Venture v. Lomas & Nettleton Fin. Corp., 667 S.W. 2d 593 (Tex. Ct App. 1984) . . 9

In re All Media Props., Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex 1980) *aff'd per curiam*, 646 F. 2d 193 (5th Cir. 1981) 15

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 8

McHenry v. Littleton, 237 Ark. 483, 374 S.W.2d 171 (Ark. 1964) 10

United States v. Culver, 958 F.2d 39 (4th Cir. 1992) 11

Walker v. White, 618 P.2d 561 (Alaska 1980) 10

Wekell v. United States, 14 F.3d 32 (9th Cir. 1994) 15

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the U.S. Constitution . . . 3,8

§ 362(a) of Title 11 of the U.S. Code (the Bankruptcy Code) 3

§ 213(4) N.Y. Civil Practice Law and Rules 4

§ 17-101 of the N.Y. General Obligations Law . . . 4,7

§ 17-105(1) of the N.Y. General Obligations Law . . . 4

11 U.S.C. 362 14

11 U.S.C. 101(5) 15

11 U.S.C. 362(a)(1) 15

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH PETITO,

Petitioner

-against-

ALICE-MARY PIFFATH, as Administratrix of the Estate of RALPH PETER PIFFATH,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JOSEPH PETITO (PETITO) respectfully petitions this Court to issue a Writ of Certiorari to review an order of the New York Court of Appeals, dated February 21, 1995, which adhered to a December 13, 1994 opinion of that court which reversed an order of the Appellate Division of the Supreme

Court of the State of New York upholding a judgment in favor of the petitioner in a mortgage foreclosure action. The Appellate Division found that enforcement of the mortgage was not barred by the applicable Statute of Limitations because a 1981 stipulation executed by the respondent's decedent, Ralph Peter Piffath (PIFFATH) constituted an acknowledgment of the mortgage debt which caused the Statute of Limitations to run anew and that PETITO's action was therefore timely commenced. The Court of Appeals premised its reversal on its opinion that the agreement to pay a sum of money to settle a mortgage foreclosure action did not amount to an acknowledgment of the debt sufficient to renew the Statute of Limitations.

PARTIES

The parties are as set forth in the caption. There have been no changes.

OPINIONS BELOW

The opinion/order of the Court of Appeals of the State of New York is submitted herewith in the appendix as A.2 - A.10. The order is reported at 85 N.Y.2d 1.

The order of the Appellate Division of the Supreme Court of the State of New York are attached hereto in the

appendix as A.11- A.13. The order is reported at 199 A.D.2d 252.

JURISDICTIONAL STATEMENT

This petition seeks review of an order entered by the Court of Appeals of the State of New York on February 21, 1995, which adhered to an opinion dated December 13, 1994. The jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1254(1).*

This petition is timely filed within ninety days of the date that the order upon which review is sought became effective.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution states, in relevant part:

"No State shall *** deprive any person of life, liberty, or property, without due process of law ****"

2. Section 362(a) of Title 11 of the United States Code (the Bankruptcy Code) provides, in pertinent part that "[the filing of a petition operates as a stay against the]

> (1) commencement or continuation *** of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a

claim which arose before the commencement of the case under this title. "

3. Section 213(4) of the New York Civil Practice Law and Rules provides, in pertinent part that:

"[A]n action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein *** must be commenced within six years."

4. Section 17-101 of the New York General Obligations Law [GOL] provides, in relevant part that:

> An acknowledgment or promise contained in writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules ***

5. Section 17-105(1) of the GOL provides, in pertinent part that:

"*** a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage *** either with or without consideration, *** make[s] the time limited for the commencement of the action run from the date of the *** promise."

STATEMENT OF THE CASE

PIFFATH initially borrowed $200,000 from Roslyn Savings Bank (ROSLYN) in order to purchase certain real property located in Suffolk County, New York in 1970. In exchange for the loan, PIFFATH executed a noted and a mortgage whose terms required monthly payments for a period of ten years, with a balloon payment of the remaining principal to be paid on April 1, 1980. The last monthly payment on the mortgage was made on August 7, 1980; however, PIFFATH failed to make the balloon payment and ROSLYN instituted foreclosure proceedings (A. 3).

Thereafter, in June 1981, PIFFATH and ROSLYN entered into a stipulation of settlement of the foreclosure action whereby PIFFATH agreed to pay ROSLYN the sum of $197,455.57, which represented the entire sum due and owing on the mortgage (A. 3). In exchange therefor, ROSLYN agreed to deliver an assignment of the mortgage to PIFFATH's designee and to vacate the judgment of foreclosure. PIFFATH assigned the mortgage to his brother rather than obtaining a satisfaction of the mortgage so that he could continue to defeat his creditors (A. 4).

Shortly after this transaction was completed, the mortgage was used as collateral to secure a $50,000 loan made by Marine Midland Bank to Hydrodyne Industries, a corporation

that was then controlled by PIFFATH and his brother. As a result of Hydrodyne's financial difficulties, the PIFFATHs entered into an arrangement with PETITO in 1982 under which the mortgage was assigned to PETITO, who agreed to refinance Hydrodyne's debt (A. 4). Hydrodyne subsequently filed for protection under Chapter 11 of the United States Code (the Bankruptcy Code) (Record on Appeal, at p. 118).

In October of 1986, PIFFATH commenced a proceeding for a declaration that the mortgage no longer had any legal effect because its enforcement was barred by a six-year Statute of Limitations applicable to mortgage foreclosure proceedings. Thereafter, PETITO commenced a plenary foreclosure proceeding. The two cases were consolidated for trial, and a bifurcated hearing was held before a Judicial Hearing Officer ["JHO"].

The JHO held that PIFFATH should be equitably estopped from asserting the Statute of Limitations as a defense because of his conduct in keeping the mortgage alive as a means of "defrauding" his creditors. The JHO also concluded that PIFFATH was properly held responsible because he had intentionally placed the mortgage in "the field of commerce" when he assigned it to his brother. A judgment was entered against PIFFATH (A. 5).

On cross-appeals by PETITO and PIFFATH's

administratrix, the Appellate Division rejected the JHO's conclusion that PIFFATH was equitably estopped from asserting the Statute of Limitations because of his intent to "defraud" his creditors, since "there [was] no evidence that *** PIFFATH misled the plaintiff." (A. 5). Nonetheless, the court held that enforcement of the mortgage was not barred by the Statute of Limitations. In the court's view, PIFFATH's 1981 stipulation with ROSLYN "amounted to a promise to pay a mortgage debt *** thereby causing the Statute of Limitations to run anew," and that PETITO's foreclosure action was therefore timely commenced (A. 5-6).

THE COURT OF APPEALS' OPINION AND ORDER

By opinion and order dated December 13, 1994, the New York Court of Appeals reversed the order of the Appellate Division, finding that "the stipulation in this case, which was followed by actual payment of an outstanding debt that arose pursuant only to that stipulation, cannot be deemed an acknowledgment of an outstanding debt sufficient to re-start the running of the Statute of Limitations under General Obligations Law § 17-101." (A. 8). The court reasoned that since PIFFATH's agreement to pay ROSLYN $197,455.57 contains neither an express acknowledgment of his indebtedness nor an express promise to pay the mortgage debt per se, "the promise to pay *** that is contained in the settlement agreement

represents PIFFATH's undertaking of a new obligation in exchange for ROSLYN's promises to terminate the foreclosure action and assign the mortgage to PIFFATH's brother. As such, it is not a 'promise to pay a mortgage debt' and, consequently, does not suffice to satisfy the statute." (A. 9). Essentially, the court concluded that PIFFATH's promise to pay and his payment were referable "not to the mortgage debt" but rather to the agreement between PIFFATH and ROSLYN (A. 9).

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS' DENIAL OF RECOVERY ON A VALID LIEN CONSTITUTED A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The Fourteenth Amendment to the United States Constitution provides that no State shall deprive any person of property without due process of law. In this case, the convoluted analysis by the New York Court of Appeals effectively stripped PETITO of his property, namely, his rights under the mortgage, without due process of law.

The protection of due process applies to proceedings in which a property right, created by an independent source such as state law, is subject to impairment or deprivation. *Board of Regents v. Roth*, 408 U.S. 564, 569.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422

(1982), this Court re-affirmed that due process as applied to a protected property interest having its genesis in state law, cannot be extinguished without an opportunity granted at a meaningful time and in a meaningful manner for the claimant to present his or her side of the issue. The *Logan* case contains a survey of prior Supreme Court decisions dealing with the determination of whether the claimant had a protected interest and if so, what process was due before that interest could be impaired or extinguished. *See, also, Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

It has consistently been the rule as reflected in the reported state and federal cases that where an obligor reaffirms the existence and validity of a debt this causes the statute of limitations for suit on such an obligation to be renewed.

For example, the Court of Appeals of Texas held that the applicable statute of limitations was renewed by a settlement agreement reached in a suit on the debt in *Corinth Joint Venture v. Lomas & Nettleton Fin. Corp.*, 667 S.W.2d 593 (Tex. Ct. App. 1984). There, the agreement provided for payments of both principal and interest owed under the promissory note. In the instant matter, the New York Court of Appeals was likewise dealing with a settlement agreement in a lawsuit on the underlying debt which provided for payment of principal and interest based upon that obligation. Here, not only

were payments provided for and the debt acknowledged between the parties, PIFFATH arranged for it to be made a matter of public record that such an obligation was a valid and enforceable lien, expressly intending that it prevent other creditors' claims from taking priority over the mortgage debt at issue.

Likewise, the Supreme Court of Alaska, in *Walker v. White*, 618 P.2d 561 (Alaska 1980), held that certain letters written by the purchasers of real property subject to a foreclosure action constituted acknowledgments of the debt sufficient to renew the applicable statute of limitations. Notwithstanding the plaintiffs' contention that the letters were not "direct unqualified and unconditioned," the court found that the purpose of the statute of limitations (to protect against difficulties caused by lost evidence, faded memories and disappearing witnesses) was "not advanced by imposing rigorous requirements of formality on acknowledgments. Such requirements *** would only heighten the statute's unfortunate effect of occasionally barring meritorious claims." *Id.* at 563.

And in *McHenry v. Littleton*, 237 Ark. 483, 374 S.W.2d 171 (Ark. 1964), the Supreme Court of Arkansas held that the borrowers' letters stating that they hoped to be able to pay their account in the near future and offering to pay a portion of the account only because they could not yet pay it all, were

sufficient acknowledgments to revive the debt.

This same rule applies with respect to federal statutes of limitations, as demonstrated in *United States v. Culver*, 958 F.2d 39 (4th Cir. 1992). In *Culver*, an action was brought to collect the outstanding balance and interest due on a Small Business Administration loan. Under the applicable loan guarantee program, a six-year limitation period would begin to run at the time of the demand; however, in the event of a partial payment or acknowledgment of the debt, a cause of action would accrue at the time of the partial payment or acknowledgment. *Culver* stands for the proposition that a mere listing of the obligation on a private financial statement is sufficient to constitute an acknowledgment and renew the statute of limitations. Here, PIFFATH not only acknowledged in a court stipulation between ROSLYN and himself that there was a valid debt, he procured an assignment, a public record, that he was indebted to his brother in the amount recited in the instrument and that the instrument was valid.

The Fourth Circuit Court of Appeals in *Culver* held that the borrower's listing of the debt in financial statements given to the Small Business Administration served as an acknowledgment of the debt and was sufficient to start anew the running of the six-year limitations period.

In the instant matter, the New York Court of Appeals

has so deviated from this consistent policy as to call into question what was considered to be a well-settled doctrine upon which persons engaged in commercial transactions have justifiably relied.

Specifically, under the Court's flawed reasoning, which was based on nothing more than semantics, PIFFATH's agreement, to pay the full amount due and owing under the mortgage debt in exchange for ROSLYN's agreement to discontinue its foreclosure action on the mortgage debt and to transfer the mortgage itself to PIFFATH's brother, were deemed insufficiently connected to the mortgage debt. The Court of Appeals opined that an assignment of a mortgage which the debtor later attempts to assert did not secure any obligation was not an acknowledgment of the existence of that debt merely because the written agreement "contain[ed] neither an express acknowledgment of [PIFFATH's] indebtedness nor an express promise to pay the mortgage debt per se." In fact, the Court of Appeals reasoned that PIFFATH's payment of $197,455.57 was completely divorced from the mortgage and "represent[ed] PIFFATH's undertaking of a new obligation in exchange [only] for ROSLYN's promises to terminate the foreclosure action and assign the mortgage to PIFFATH's brother. The effect of this ruling clearly deprives PETITO of redress.

The procurement or recording of an instrument proclaiming the existence of a valid secured debt; namely, the assignment of the mortgage "in recordable form" to PIFFATH's brother, coupled with the stipulation settling a foreclosure action that was inextricably linked to the mortgage debt at issue, constituted an acknowledgment sufficient to renew the six-year statute of limitation. If under the reasoning of *Culver,* the listing of a debt in an SBA loan application was sufficient to renew the statute of limitations to enforce that obligation and under the reasoning in *Nettleton*, a stipulation settling an action on the debt was sufficient to renew the statute of limitations, certainly both a stipulation settling an action on the debt and PIFFATH's procurement of an assignment and consent to the recording of an assignment evidencing the mortgage debt constituted an acknowledgment sufficient to renew the statute of limitations on the claim. To adopt the contrary reasoning of the New York Court of Appeals below would encourage debtors to cause public records evidencing legal obligations to be used as a means to defeat creditors with legitimate claims.

B. THE COURT OF APPEALS FAILED TO PROPERLY APPLY THE PRINCIPLE THAT BECAUSE OF HYDRODYNE'S BANKRUPTCY FILING THE AUTOMATIC STAY UNDER *11 U.S.C. 362* TOLLED THE RUNNING OF THE STATE STATUTE OF LIMITATIONS.

This Court is the final arbiter of federal law. In this instance, the Court is asked to decide whether the New York Court of Appeals' determination was further in error because of its failure to consider the effect of Hydrodyne's bankruptcy filing and the automatic stay upon the running of the state statute of limitation pertinent to the mortgage which was pledged as collateral thereto.

The automatic stay under *11 U.S.C. 362* served to toll the statute of limitations by Hydrodyne's Chapter 11 filing when the extent and enforceability of the debt was pledged as collateral and vested in the bankruptcy court. This is so because the automatic stay precluded any action on the guarantee against the debtor, since the automatic stay applies even to claims which are contingent, unmatured or unliquidated. Contingent, unmatured and unliquidated obligations are deemed to arise pre-petition under the Bankruptcy Code and are defined as claims vested within the Bankruptcy Court's jurisdiction and therefore all judicial proceedings to recover or pursue such a claim is stayed. The stay applies even if the debtor is only

secondarily liable on the obligation and no judgment or formal judicial proceeding has yet been commenced against the debtor. 11 U.S.C. 101(5), 362(a)(1); In *re All Media Props., Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980) *aff'd per curiam*, 646 F.2d 193 (5th Cir. 1981) .

To the extent that the automatic stay tolls the statute of limitations on collection of certain debts, it will do so until the bankruptcy petition is dismissed, the case caption is changed, or the bankruptcy court grants relief from the stay. *Wekell v. United States*, 14 F.3d 32 (9th Cir. 1994).

During the period prior to the expiration of the original statute of limitations in this case, Hydrodyne filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code and thereby invoked the automatic stay for a period exceeding one year. As such, the Supreme Court should accept the case because of the failure of the Court of Appeals to properly apply the federal toll which arose from the bankruptcy filing. The toll created by the automatic stay renders this case timely even if calculated from the date of the original default in August of 1980, because PETITO commenced the foreclosure action at issue here in February of 1987, six and one half years after PIFFATH's original default, which would render the suit unquestionably timely as this extended period is well within the period in which the automatic stay acted as a toll.

CONCLUSION

For the foregoing reasons, petitioner JOSEPH PETITO respectfully prays that the Petition for a Writ of Certiorari be granted, along with such other and further relief as this Court may deem just, proper and in the interests of justice.

Dated: Mineola, New York
May 20, 1995

Respectfully submitted,

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Order of the Court of Appeals
on Reargument dated February 21, 1995

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION February 21, 1995

Mo. No. 163
Joseph Petito,
Respondent,
v.
Alice-Mary Piffath, etc.
Appellant,
et al.,
Defendants.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

Order of the Court of Appeals dated December 13, 1994

Joseph Petito, Respondent v Alice-Mary Piffath, & Co. Appellant, et al

Defendants

1994 N.Y. Int. 220
December 13, 1994

2 No. 199 [1994 NY Int. 220] Decided December 13, 1994

This opinion is uncorrected ,and subject to revision before publication in the New York Reports.

Jeffrey S. Horn, for Appellant.

Sharon Weintraub Dashow, for respondent.

TITONE, J.:

This case presents the question whether under General Obligations Law §§ 17-101, -105(1) or -107(2)(b) a stipulation settling a foreclosure action could properly be construed as a written acknowledgment of the underlying mortgage debt, a promise to pay or a part payment of that debt sufficient to revive an otherwise time-barred claim based upon the mortgage. Under the circumstances presented in this somewhat idiosyncratic case, we hold that plaintiff's stale claim on the mortgage was not revived.

Defendant's decedent, Ralph Peter Piffath, initially borrowed approximately $200,000 from Roslyn Savings Bank ("Roslyn") in order to purchase real property located at 35 Gilpin Ave., Hauppauge, New York. In exchange for the loan, he executed a note and a mortgage whose terms required monthly payments for a period of ten years, with a balloon payment of the remaining principal to be paid on April 1, 1980. Piffath evidently failed to make the balloon payment on time. He and his wife did make a payment of $1,932. on August 7, 1980, but this payment left a substantial balance outstanding. Accordingly, Roslyn instituted foreclosure proceedings.

These proceedings terminated in a settlement that was embodied in a stipulation executed on June 24, 1981. The stipulation provided that the action was settled "upon the following terms and conditions":

> 1. That defendant, RALPH PETER PIFFATH, shall pay to the plaintiff the sum of *** $197,455.57. That in consideration for said payment and subject to collection, [Roslyn] shall deliver an assignment of mortgage in recordable form to defendant's designee, GERALD PIFFATH [Ralph Piffath's brother]. The aforesaid assignment shall be without recourse or warranty of any kind***.
>
> 2. [Roslyn's] attorneys agree to make application to the Court for an order vacating the judgment of foreclosure and sale, discontinuing the action and canceling the notice of pendency of action without cost to either party. It is undisputed that Roslyn was paid the $197,455.57 specified in the

> stipulation, that the foreclosure action was discontinued and that the mortgage was, in fact assigned to Piffath's brother. It is also undisputed that Piffath decided to have the mortgage assigned to his brother rather than satisfied and extinguished because he wanted to preserve it as a means of preventing his other lien creditors from levying against his property.

Shortly after this transaction was completed, the mortgage was used as collateral to secure a $50,000 loan made by Marine Midland Bank to Hydrodyne Industries, a corporation that was then controlled by Piffath and his brother.[1] As a result of Hydrodyne's continuing financial difficulties, the Piffaths entered into an arrangement with plaintiff Petitio in 1982 under which plaintiff agreed to refinance Hydrodyne's debt and the mortgage on Piffath's Hauppauge property was assigned to plaintiff (subject to the pledge to Marine Midland).

In October of 1986, Piffath commenced an RPAPL § 1501(4) proceeding in Queens County Supreme Court for a declaration that the mortgage no longer has any legal effect because its enforcement was barred by the six-year Statute of Limitations (see, CPLR 213[4]). In response, plaintiff commenced a plenary foreclosure action in Suffolk County in February, 1987. The Supreme Court, Suffolk County (Friedenberg,J.), consolidated the two cases for trial in Queens County, and a bifurcated hearing was held before a Judicial Hearing Officer ("JHO").

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[1] The $50,000 had been borrowed to enable Piffath to pay Roslyn the full amount of the agreed-upon settlement.

With regard to the enforceability of the mortgage, the JHO held that Piffath should be equitably estopped from asserting the Statute of Limitations as a defense because of his conduct in keeping the mortgage alive as a means of "defrauding" his creditors. The JHO also concluded that Piffath was properly held responsible because he had intentionally placed the mortgage in the "field of commerce" when he assigned it to his brother. With regard to the amount owed, the JHO determined that the sum of $183,586.45 was due and that, with interest, costs and disbursements, plaintiff was entitled to recover the sum of $351,486.18. A judgment for that amount was entered against Piffath.[2]

On the cross-appeals by plaintiff and Piffath's administratrix, the Appellate Division modified by changing the last date for the assessment of interest and otherwise affirming.[3] The court rejected the JHO's conclusion that Piffath was equitably estopped from asserting the Statute of Limitations because of his intent to "defraud" his creditors, since "there [was] no evidence that *** Piffath misled the plaintiff" (199 AD2d 252,253). Nonetheless, the court held that enforcement of the mortgage was not barred by the

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[2] Further proceedings for a foreclosure sale had been rendered unnecessary, because, by agreement of the parties, the Hauppauge property securing the mortgage had been sold and the proceeds secured by a bond to provide a fund against which any judgment in the foreclosure action could be enforced. The parties' actions in this regard thus resulted in a de facto conversion of the foreclosure action to one for a money judgment alone.

[3] The Appellate Division remitted to the Supreme Court for a ministerial "recalculation of interest" in accordance with its conclusion that interest should be computed to July 12, 1990 rather than May 24, 1990.

Statute of Limitations. In the court's view, Piffath's 1981 stipulation with Roslyn "amounted to a promise to pay a mortgage debt *** thereby causing the Statute of Limitations to run anew"(id., citing General Obligations Law § 17-105; Aleci v Tinsley's Enterprises, 102 AD2d 808). Plaintiff's 1987 foreclosure action was therefore timely under CPLR 213(4). Piffath's administratrix now appeals by permission of this Court, challenging the latter aspect of the Appellate Division's analysis.

At the outset, we note our agreement with the Appellate Division's conclusion that Piffath's administratrix cannot be estopped from asserting the Statute of Limitations because of Piffath's so-called "fraudulent" conduct. Although this Court has held that a party may be estopped from pleading the Statute of Limitations as a defense where a "defendant's affirmative wrongdoing produced the long delay [in bringing suit]" (General Stencils, Inc. v Chiappa, 18 NY2d 125, 128; see Simcuski v Saeli, 44 NY2d 442), that principle has no application where, as here the defendant's "fraudulent" conduct was not aimed at the plaintiff and did not in any way prevent the plaintiff from commencing a timely action.

The remaining substantive issue, however, is not so easily resolved. Whether an unadorned agreement to pay a sum of money to settle an action on a debt constitutes an acknowledgment of the debt sufficient to renew the running of Statute of Limitations for enforcement of the debt itself has not been squarely addressed by this or any other appellate court in this state. The issue is squarely presented here because, unlike in most situations in which an action is settled, the settlement in this case did not result in an extinguishment of the underlying instrument evidencing the debt, i.e., the Roslyn mortgage. Instead, because of Piffath's desire to obstruct his other creditors, the settlement with

Roslyn was structured so as to preserve the enforceability and legal effect of that instrument.

Resolution of this controversy depends on the proper application of General Obligations Law §§ 17-101, 17-105(1) and 17-107(2)(b). § 17-101 provides that "[a]n acknowledgment or promise contained in writing signed by the party to be charged thereby is the only competent evidence of a new and continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the [CPLR]. "Under G.O.L. § 17-105(1), "a [written] promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage ***, either with or without consideration" makes the time limited for the commencement of the action "run from the date of the *** promise." Finally, under G.O.L § 17-107(2)(b), a partial payment "on account of a mortgage indebtedness, "is effective to revive an action to recover such indebtedness in favor of a mortgagee "or his assignee" or any other party who subsequently succeeds to an interest in the mortgagee's enforcement.

Plaintiff, the assignee of Roslyn's mortgage, argues that Piffath's 1981 agreement to pay Roslyn the sum of $197,455.57 constituted either an acknowledgment of the outstanding mortgage debt within the meaning of General Obligations Law § 17-101 or a new promise to pay within § 17-105(1). Alternatively, plaintiff argues that Piffath's payment of the amount specified in the settlement agreement constituted a partial payment "on account of mortgage indebtedness" within General Obligations Law § 17-107(2)(b) and was therefore sufficient to re-commence the running of the six-year Stature of Limitations governing such debts. However, the application of the debt-acknowledgement and partial-payment statutory provisions to these facts is not so clear.

Piffath's agreement to pay Roslyn $197,455.57 contains neither an express acknowledgement of his indebtedness nor an express promise to pay the mortgage debt per se. Rather, the agreement contained only a promise to pay Roslyn a specific sum in exchange for Roslyn's agreement to forego a prosecution of its foreclosure action and assign the mortgage to Piffath's nominee. The facts in this case are thus analogous to those in Lew Morris Demolition Co. v. Board of Educ. of the City of New York (40 NY2d 516), in which this Court held that an executed stipulation partially settling a contractor's claim for payment for work performed did not constitute an acknowledgment of a larger debt or partial payment of that debt within the meaning of G.O.L. § 17-101, because the writing "did not recognize an existing debt" (see also, Connecticut Trust and Safe Dep. Co. v. Wead, 172 NY 497). A fortiori, the stipulation in this case, which was followed by actual payment of an outstanding debt that arose pursuant only to that stipulation, cannot be deemed an acknowledgment of an outstanding debt sufficient to re-start the running of the Statute of Limitations under General Obligations Law § 17-101.[4]

Plaintiff's argument predicated on the provisions of General Obligations Law § 17-105(1) regarding "a [written] promise to pay the mortgage debt" is no more persuasive.

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[4] The parties to this appeal have not made any arguments regarding the applicability of General Obligation Law § 17-101's debt-acknowledgment provisions to a situation where the claimed "acknowledgment" was made to a third-party rather than to the person seeking to enforce the debt. We have thus not considered the degree to which plaintiff's rights under the statute made have been affected by the fact that Piffath's purported "acknowledgment" was made to Roslyn and not to him (see generally, Matter of Kendrick, 107 NY 104; DeFreest v. Warner, 98 NY 217; cf, General Obligations Law § 17-107[2][b]).

The promise to pay $197,455.57 that is contained in the settlement agreement represents Piffath's undertaking of a new obligation in exchange for Roslyn's promises to terminate the foreclosure action and assign the mortgage to Piffath's brother. As such, it is not a "promise to pay a mortgage debt" and, consequently, does not suffice to satisfy the statute.

For similar reasons, Piffath's payment of $197,455.57 cannot be deemed a partial payment "on account of a mortgage indebtedness" under General Obligations Law § 17-107(2)(b). The defect in plaintiff's claim under § 17-107(2)(b) is no different from that of his claim under § 17-105(1): both the promise to pay and the "part payment" on which plaintiff relies are referable not to the mortgage debt that plaintiff seeks to enforce, but rather to the agreement between Piffath and Roslyn, as to which plaintiff has no rights at all.

Moreover, Piffath's payment to Roslyn did not satisfy the longstanding rule under § 17-107(2)(b)'s predecessor that "[i]n order to make a money payment a part payment within the statute, the burden is upon the creditor to show that it was***accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due" (Crow v. Gleason, 141 NY 489, 493). The rule is a natural corollary of the principle that there must be sufficient basis "as [would] warrant a jury in finding an implied promise to pay the balance" (id.). Manifestly, such a showing cannot be made where, as here, the payment was pursuant to a settlement intended to put the outstanding monetary obligations between the parties to rest.

In short, neither the settlement agreement nor the payment Piffath made pursuant thereto provides a cognizable basis for ruling that the Statute of Limitations on Piffath's

mortgage debt began to run anew in 1981. Thus, by 1986 -- the first time that the courts were called upon to consider the enforceability of the debt -- it was time-barred. It follows that the courts below erred in granting plaintiff judgment on the debt.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the Petito complaint dismissed and, on the Piffath complaint, judgment granted declaring that all claims under the bond and mortgage are barred by the Statute of Limitations.

Order reversed, with costs, the Petito complaint dismissed and, on the Piffath complaint, judgment granted in accordance with the opinion herein. Opinion by Judge Titone, Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur.

Decision and Order of the
Appellate Division - Second Department
dated December 6, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

Argued - October 19, 1993

ALBERT M. ROSENBLATT, J.P.
DAVID S. RITTER
JOHN COPERTINO
VINCENT PIZZUTO, JJ.

90-07566

DECISION & ORDER

Joseph Petito, respondent-appellant, v Alice-Mary Piffath, etc., appellant-respondent, et al., defendants.

Horn, Horn & Ramme, Huntington, N.Y. (Jeffrey S. Horn of counsel), for appellant-respondent.

Sharon Weintraub Dashow, Brooklyn, N.Y., for respondent-appellant.

In an action, inter alia, to foreclose a mortgage, the defendant Alice-Mary Piffath appeals, and the plaintiff cross-appeals on the ground of inadequacy, from a judgment of the Supreme Court, Queens County (Hyman, J.H.O.), entered July 12, 1990, which, is in favor of the plaintiff and against the defendant Piffath in the principal amount of $183,586.45.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof awarding the plaintiff interest to May 24, 1990 in the amount of $163,790.73, and substituting therefore a provision awarding the plaintiff interest to July 12, 1990; as so modified, the judgment is affirmed, with costs payable to the plaintiff, and the matter is remitted to the Supreme Court, Queens County, for recalculation of interest in accordance herewith and entry of an appropriate amended judgment.

While the record supports the conclusion that the defendant Piffath acted with intent to defraud other creditors, there is no evidence that the defendant Piffath misled the plaintiff. The Supreme Court therefore erred in concluding that the defendant Piffath was estopped from asserting the Statute of Limitations as a bar to the plaintiff's foreclosure action (see, *Simcuski v. Saeli, 44 NY2d 442, 448-449; Hoffman v. Hoffman, 162 AD2d 249*).

We find, however, that the defendant Piffath's stipulation with the original mortgagee, wherein the defendant Piffath agreed to pay the full amount due in exchange for the assignment of the mortgage and note to his brother, amounted to a promise to pay a mortgage debt, made after the accrual of a right of action to foreclose the mortgage, thereby causing the Statute of Limitations to run anew (see, General Obligations Law § 17-105; *Aleci v. Tinsley's Enterprises, 102 AD2d 808*). The plaintiff's action to foreclose was therefore timely (see, CPLR 213[4]).

We find no merit to the plaintiff's contention that the Supreme Court erred in deducting previously-paid interest from the amount due on foreclosure. In addition, the court properly denied the plaintiff's request for compound interest, since the mortgage does not provide for such (see, *Kenneth Pregno Agency v. Letterese, 112 AD2d 1032, 1033; Schwall*

v. Bergstol, 97 AD2d 540, 541). The court did err, however, in awarding prejudgment interest accrued until May 24, 1990, as the plaintiff is entitled to interest accrued until the date of entry of the judgment (see, CPLR 5002; *Kenneth Pregno Agency v. Letterese, supra; Schwall v. Bergstol, supra).*

The plaintiff's contention that he is entitled to late charges according to the terms of the mortgage is without merit, as the plaintiff did not seek to recover the late charges in his pleadings, did not seek leave to amend the pleadings, and did not raise the issue at the trial. The plaintiff's arguments regarding certain disbursements and additional allowances disallowed by the clerk at the time of the taxation of costs are unpreserved for appellate review, since the plaintiff failed to move in the Supreme Court for judicial review of the determination of the clerk (see, CPLR 5501[a]; 8404).

ROSENBLATT, J.P., RITTER, COPERTINO and PIZZUTO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

December 6, 1993

PETITO v PIFFATH